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TRIAL BY JURY.[1]

Time out of mind trial by jury in civil as well as criminal cases has existed in England, and from the first, unanimity of decision appears to have been required.

Much may be said against the peculiarity of unanimity in this time-honored institution, and indeed much may be said against the institution itself.

It is a fact that none of the continental States of Europe have adopted trial by jury in civil cases. It is a fact that nearly all the States which have adopted it in criminal cases, have rejected the English characteristic, of unanimity. In Belgium trial by jury was only established in 1830, and the decision is by a bare majority. In France it was introduced in 1791, and, notwithstanding many fluctuations, decision by majority is now the rule. In the German States such is also the rule. In Scotland, as there is a mode of getting at the facts of a case by what is termed precognition, a procedure by the sheriff, trial by jury in civil cases is the exception, not the rule. By a recent English statute, 17 & 18 Vict. c. 59, if in a civil case the jury is unable to agree after a deliberation of six hours, the verdict of nine may be taken as the verdict of the whole. In the

[1] From the Upper Canada Law Journal.

United States, when colonies of Great Britain, trial by jury in civil and criminal cases, requiring unanimity of decision, became the law of the land, and continues so to be.

Of trial by jury in England it may be well said, "time consecrates, and what is gray with age becomes religion." Still, men there have been bold enough to question its wisdom, and irreligious enough to discuss its merits. No less an authority than Hallam, the historian, has pronounced it to be "a preposterous relic of barbarism." Supplemental Notes to Middle Ages, 262. Without endorsing an assertion so sweeping, we readily admit that trial by jury, if not defensible on reason, ought not to be supported on prestige—if not compatible with the safe, speedy, and economical administration of justice, ought not to be bolstered up and preserved solely because of its antiquity.

The first thought that occurs to the mind is, that if the system as a whole, or unanimity as an attribute of it, were indefensible, neither could successfully have escaped the innovations of modern law reform, nor indeed have been tolerated by a people so practical, so free, and so judicious as the people of England. We place little reliance on any argument based merely on the laws of surrounding nations. Of a nation, as of an individual, it may be affirmed that what is one man's meat is another man's poison.

In common with our fellow men we subscribe to the apothegm of Bacon, "Stare super vias antiquas et videre quœnam sit via recta et bona et ambulare in ea;" or, in plain English, "We shall make a stand upon antiquity until we discern a way of improvement, and then only shall leave our present path."

Though we have reflected deeply upon the subject, we have failed to discover the improvement to be effected by a majority verdict. Is it to be the verdict of a bare majority? Is it to be the verdict of a two-thirds majority? We believe the greater number of majority advocates are in favor of the latter. What are the arguments which they advance? Such as the following:—

It is absurd to attempt to convince twelve men of different degrees of capacity of the truth or falsity of a particular state of facts. All analogy in social and political bodies is in favor of the

majority system. It is at present in the power of one corrupt man by force of endurance—argumentum ad ventrem—to defeat justice. These we take to be the chief, and by many thought to be the unanswerable, arguments against the requirement of unanimity.

Before going further we shall apply ourselves to the consideration of these arguments.

In the first place, it is not absurd to attempt to convince twelve men of the truth or falsity of a given state of facts, when the twelve men are jurors, though of different degrees of capacity. We appeal to facts. In how many cases are jurors discharged because unable to agree? Not in one case in one hundred. The fallacy rests in this—that twelve jurors are looked upon as twelve ordinary men, unassisted by the guiding and governing influence of a presiding judge. There is no such thing, strictly speaking, as trial by jury. There is trial by judge and jury, which is a very different thing. When in ninety-nine cases out of one hundred, men so placed do render unanimous verdicts, it is surely gratuitous to say that they cannot do so.

In the second place, the argument drawn from analogy in political and social bodies is not a sound argument. A body of jurors is called upon to decide facts, not to express opinions. Nothing more need, we apprehend, be said upon this head.

In the third place, though it is in the power of a corrupt juror, by physical endurance, to delay justice, it is not in his power to defeat it. He may "hold out" for three, six, nine, twelve, twenty, or twenty-four hours, without food, and may by so doing inconvenience his fellow jurors; but unless they are as corrupt as himself, they will not succumb to the argumentum ad ventrem. It is, under such circumstances, the tendency of man's nature to resist, not to yield to bullying injustice. Besides, the case supposed is an extreme case, and one of a very exceptional character. To make it occur at all, there must first be the corrupt man, which, owing to the selection, drafting, and empannelling of jurors under the laws, is more likely not to be than to be. Then this corrupt man must have stronger powers of endurance than eleven other men indiscriminately chosen, which, according to the laws of nature and of chance, is more likely not to be than to be. The argument in every

aspect is untenable. But let us turn from theory to practice, and what are the facts? When a jury, after having retired for a certain number of hours, less or more, in the discretion of the judge, are unable to agree, they are discharged[1]—that is, released from the pains of hunger, unsullied with the crime of perjury. No verdict is rendered. The plaintiff may again have his case brought to trial, when the chances are ten thousand to one, that the corrupt man, with strong powers of physical endurance, will not be on the second jury. We think we hear our casuist say, "Though there be not the same man there may be another equally corrupt." Concede this plethora of corrupt men, and concede also the majority system, what follows? If there may be one corrupt juror, why may there not be two, three, four, five, six, or more? If four, the two-thirds majority scheme can be no cure of the evil. If six, not even the bare majority scheme would be a cure.

The truth is, and it must be told, that the argument of a corrupt juror, though a very common one, is an idle phantom. If corrupt jurors were as as prevalent as we must suppose them to be, to make the argument worth anything, there would be more juries discharged for want of unanimity than one in one hundred, which is not the fact; nor can it be the fact, or taken to be the fact, unless it is argued that in ninety-nine cases out of one hundred there are at least ninety-nine juries, each having at least eleven corrupt jurors, which is absurd.

Now let us turn to the other side, and review the arguments in favor of unanimity.

The object of a trial by jury, as it is commonly called, is the discovery of truth. To discover truth, when mixed with falsehood, patient and anxious deliberation is essential. Without these any mode of trial, instead of being a blessing, would be a curse. Anything having a leaning towards lessening deliberation in trial by jury ought to be avoided. We submit that a departure from unanimity would have this effect.

First let us suppose unanimity to be no longer necessary. The first object of the jurors upon retiring would be to marshal numbers.

[1] Consult McCreary v. Commonwealth, 5 Casey, 323.

Should it be found that nine are agreed upon a particular verdict, the opinions of the minority would be passed over without any discussion whatever. Thus would the necessity for deliberation be removed. Now, suppose a unanimous verdict necessary. Any person dissenting would have the right to explain his views, and to compel the majority to listen to them. Reason, not mere numbers, would be the characteristic of the jury room. Well has Tacitus said, that truth is established by investigation and delay, but falsehood prospers by precipitancy. Under the present system any juror, no matter how humble his attainments, how insignificant his reputation, how lowly his station, if he speak truth, commands respect. Truth forces itself upon the understanding of man, wherever there is any disposition, however trifling, to receive it. One thought, if expressed in the pure atmosphere of truth may flash conviction upon the willing mind. Investigation at leasts ensues, discussion takes place, and finally reason prevails.

Secondly, the verdict of twelve men is more likely to be correct than that of nine out of twelve. A learned writer says, that, cæteris paribus, two men are more likely to be right, when agreed, than one; and, for the same cause, twelve men than eleven, ten, nine, or any lesser number. Tried after this fashion, according to Poissen, in his "Recherches sur les Probabilites des Jugemens," and Lacroix, in his "Calcul des Probabilites," the probability of error in a verdict, when a majority of nine out of twelve is sufficient for decision, is about one to twenty-two; while, if unanimity is exacted, it is one to eight thousand.

Thirdly, when each juror knows that no verdict can be rendered without his concurrence, he retires from the box with a due sense of responsibility. He cannot relieve himself by saying, "I shall be content to be in the minority, and so take no part in the verdict. I shall retain my opinion, and allow the verdict to pass." He will rather say, "I must give some verdict; that verdict must be true, according to the evidence; if not true, I shall be perjured before God and man." With these solemn thoughts, he is in a right mood to search after truth. Without them, the pretended search is a mockery. Anything which has a tendency to remove individual responsibility makes inquiry after truth by jurors a mockery. The

majority system, for the reasons we have shown, has, we think, this tendency.

Fourthly, we must not restrict our view of trial by jury to the jurors themselves; we must look to its effect upon the community at large. A decision of twelve men, when unanimous, is more likely to command respect than that of nine out of twelve, especially when it is known that three dissent. So sure as one party to a suit wins, the other loses. The loser will, we maintain, more readily, more cheerfully, submit to a verdict against him when he knows that it is the undivided opinion of twelve men in no way related to his opponent more than himself, and who can have no object but that of justice in deciding for the one or the other. The feeling for him, though perhaps of sympathy, is, accompanied with that of respect for the law. This applies equally to criminal and civil cases; but in the former, as has been eloquently observed, unanimity gives strength and firmness to the stroke of justice.

These are, so far as we can call to mind, the arguments pro and con on this much-vexed question. We think the unbiased reader will have no difficulty in deciding between them. In our opinion, the arguments directed against the form of trial by jury might with some good effect be levelled against the qualification of jurors. No shifting of numbers—no shuffling of units— can qualify an unqualified juror.

Having said so much concerning the form of trial by jury, we desire to observe that we are not of those who think that it ought to be applied to the trial of every civil case involving questions of fact.

In the province of Upper Canada, trial by jury in civil cases is the rule, and in Lower Canada the exception. This, like other differences between the laws of the two sections of the province, is traceable to a difference of origin.

In England a prejudice exists in favor of trial by jury. It is not only looked upon as the palladium of an Englishman's liberty, but as a panacea for an Englishman's wrongs, civil and criminal. True, indeed, Magna Charta declares that no man shall be condemned except by the judgment of his peers. We glory in the declaration, but would confine it within bounds. Its object is to control crimi-

nal, not civil cases. Its object is to protect liberty where liberty is endangered.

It is hazarding too much to say that jurors are better fitted than judges to determine all questions of fact. A verdict is judgment in form. Judgment is the result of reason. The power to reason accurately is not possessed in a higher degree by farmers, mechanics, or tradesmen than by judges—men of learning, men of ability, whose previous study and training peculiarly befit them for the task.

Some cases there may be in which, owing to rules of trade, or other peculiar cirsumstances more within the knowledge of laymen than lawyers, the judgment of the former would be of the two the more correct. For such cases let there be trial by jury. But why should trial by jury be for all cases? Many suitors, were the option given to them, would prefer to have their disputes determined by a single intelligent judge than by any jury. In certain courts the right to demand, or rather to suffer a jury, is optional. Why should it not be so as much in the superior as in the inferior courts? In the inferior courts, where such is the case, trial by judge is the rule and trial by jury the exception. Why, then, should suitors be forced in the superior courts, or any courts, to submit to a mode of trial in which they may not have confidence? The reason is, antiquity, not wisdom—age, not reason—prestige, not usefulness.

Were trial by judge in all civil cases to be optional we should less frequently hear of perverse verdicts; we should less frequently hear of jurors being withdrawn, and no verdict; we should less frequently hear of second, third, and fourth trials, to the impoverishment of the suitor. The administration of justice would be more speedy and less expensive than at present; and these, after all, are and ought to be the great ends of legislation.

Such have been for a long time our ideas on this important head of jurisprudence. They have greatly moved us towards a feeling of respect for the machinery for dispensing justice in civil cases. Nor are the views we hold in regard to trial by jury exclusively our own. We have reason to believe that the opinions of many of the most intelligent men in our midst coincide with ours. In England similar views are steadily gaining ground. In the English *Law Times* for the 26th December last, the editor, who is a shrewd

observer of legislative wants, expressed himself to the same effect as we do on this occasion.

We would sacredly preserve trial by jury in criminal cases. In Upper and Lower Canada two laws in this respect are identical. Few question their wisdom, none having gainsayed it.

Upper Canada is greatly dependent upon England in matters of law reform. It is the policy of our legislature to await the working of a reform in England before hazarding an experiment here. We do not find fault with them for doing so in doubtful cases. But even in England, by the common law procedure act, 1854, it is provided that the parties to a cause may, by consent in writing, signed by them or their attorneys, leave the decision of any issue or issues of fact to the court. Sect. 1. Our legislature in 1856, while adopting the greater part of the act, omitted this provision. The cause of the omission is not, we should hope, a want of confidence in our judges. Our judges are as fully competent as judges in England to decide questions of fact. But whether or not, the judges of our superior courts are certainly as competent as the judges of county courts, the legislature, having granted the right to the latter, cannot with any appearance of consistency withhold it from the former. It may be that the legislature is influenced in making the distinction by a desire to save the judges of the superior courts from an unusual and not very pleasant responsibility. If this be the motive let the right of a suitor to ask for trial by the judge be given us with limitations. In England such a trial cannot be had unless the court, upon a rule to show cause, or a judge on a summons, in their or his discretion, see fit to allow the trial. To this extent at least the English system might be safely adopted.

The judges of the Court of Chancery in Upper Canada, often without the aid of a jury, determine questions of fact. Can it be said that the interests involved in chancery are of less magnitude than those involved in actions at law? The fact is the reverse, and that it is so, is universally known. Now that the power exists in chancery, and the power and the right of the suitor exists in the inferior courts, the withholding it from courts of common law of superior jurisdiction is an anomaly as tiresome to the bar as it is injurious to the suitor, as strange in practice as it is indefensible in principle.